Supreme Court, U.S.
FILED
SEP 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-160

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

Muriel C. Hume, Administratrix
of the Estate of Donald E. Hume

Petitioner,

v.

Durwood Medical Clinic, Inc.;
James H. Black; and Charles Harris,

Respondents.

On Writ of Certiorari to the Court
of Appeals of South Carolina

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Benjamin A. Johnson, Robert R. Carpenter of Roddey, Carpenter & White, P.A., P.O. Drawer 560, Rock Hill, South Carolina 29731-6560, 803-324-4500, for Respondents.

Charles L. Henshaw, Jr., O. Fayrell Furr, Jr., of the Law Offices of O. Fayrell Furr, Jr., P.A., 1534 Blanding Street, Columbia, South Carolina 29201, 803-252-4050, for Petitioner.

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
QUESTION (RESTATED)	iii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	8
CONCLUSION	26

QUESTION PRESENTED

(RESTATED)

Whether tne South Carolina Courts can, consistently with the due process requirements of the Fourteenth Amendment, exercise long-arm jurisdiction over a North Carolina Medical clinic and two North Carolina doctors in a lawsuit arising from medical services provided to a South Carolina resident at the doctors' offices in North Carolina?

TABLE OF AUTHORITIES

CASES	Page
Aaron Ferer & Sons Co. v. Atlas Scrap Iron, 558 F. 2d 450 (8th Cir. 1977)	22
Cubbage v. Merchent, 744 F.2d 665 (9th Cir.1984)	7,18, 19,20, 23
Du-Al Corp v. Randolph Beaver, Inc., 540 F. 2d 1230 (4th Cir. 1976).	12
Gelineau v. New York University Hospital, 375 F. Supp. 661 (D.N.J. 1974)	10,14, 15
Glover v. Wagner, 462 F. Supp. 308 (D.Neb. 1978)	22
Hanson v. Denckla, 357 U.S. 235 (1975)	6,11, 12,13, 16,23, 24,25, 26
Helicopteros Nacionales de Colombia, S.A. v. Hall, __ U.S. __ 104 S.Ct. 1868, 80 L.Ed. 2d 404 (1984)	16
International Shoe Co. v. State of Washington, 326 U.S. 310 (1945)	5,6, 10

Kulko v. Superior Court of California in and for the City of the County of San Francisco, 436 U.S. 84 (1978) 6,13 25

Lemke v. St. Margaret's Hospital, 552 F. Supp. 833 (N.D. Ill. 1982) 23

McGee v. International Life Insurance Company, 355 U.S. 220 (1957) 10,11, 14

Parker v. Williams & Madjanik, Inc., 270 S.C. 570, 243 S.E. 2d 451 (1978). 4,14

S.R. v. City of Fairmont, 289 S.E. 2d 712 (W.Va. 1981) . . . 18,19, 20,21

Shaffer v. Heitner, 433 U.S. 186 (1977) 25

Vencedor Mfg. Co. Inc. v. Gougler Industries, 557 F. 2d 886 (1st Cir. 1977). 13

Wolf v. Richmond County Hospital Authority, 745 F.2d 904 (4th Cir.1984) 7,16, 18,19, 24

Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). . . 8,26

Wrignt v. Yackley, 459 F. 2d 287 (9tn Cir. 1972) . . . 4,21 22

STATUTES

28 USC Section 1257(3) 1,2

S.C. Code Ann. Section . . . 3
36-2-803(1)(c) (1976)

OPINION BELOW

The decision of the South Carolina Court of Appeals is reported at 282 S.C. 236, 318 S.E. 2d 119 (1984), cert dismissed, ___ S.C. ___, 329 S.E. 2d 443 (1985).

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States by reason of 28 USC Section 1257(3) on grounds that final judgment has been rendered by the highest court of South Carolina in a case in which Respondents have contested personal jurisdiction pursuant to their due process rights under the Fourteenth Amendment. 28 USC Section 1257(3) provides that a decision may be reviewed by the Supreme Court on certiorari where the validity of a State statute is drawn in

question on the ground of its being repugnant to the Constitution of the United States. Respondents nave not contested the validity of the South Carolina long-arm statute. The South Carolina Court of Appeals has held that the conduct of Respondents falls within the long-arm statute, but that the statute could not be applied, consistently with due process, to allow the South Carolina Courts to exercise jurisdiction over Respondents. Certiorari should not be granted under 28 USC Section 1257(3) in a case where the decision of the highest court of the State is that the State statute cannot be applied consistently with the federal Constitution.

STATEMENT OF THE CASE

Petitioner has already recited the

opinions below, procedural history of the case, and applicable provisions of law. In addition, the South Carolina Court of Appeals summarized the pertinent jurisdictional facts at Petition, A-3 to A-6.

The trial court and the South Carolina Court of Appeals found that the Petitioner's pleadings and proof brought the conduct of Respondents within the scope of S.C. Code Ann. Section 36-2-803(1)(c) (1976) which provides: "(1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to the cause of action arising from the person's . . . (c) commission of a tortious act in whole or in part in this State." This section has been held by the South Carolina Supreme Court to apply "where in-state injurious conse-

quences resulted from out-of-state wrongful acts or omissions." Parker v. Williams & Madjanik, Inc., 270 S.C. 570, 243 S.E. 2d 451, 454 (1978). The South Carolina Court of Appeals reviewed the cases from other jurisdictions, Wrignt v. Yackley, 459 F. 2d 287 (9th Cir. 1972) and its progeny, "that have rejected the view that the tortious rendition of medical services out of the forum state is a portable tort which can be deemed to have been committed wherever the consequences forseeably were felt" (Petition, A-12) but nevertneless found that Petitioner had shown "by the barest of facts that (Respondents') conduct falls within the requirements of our long-arm statute." (Petition, A-15). But the South Carolina Court of Appeals went on to hold:

"We do not agree, however, that the trial court's exercise of jurisdiction under the facts of this case is consonant with due process. The test of 'minimal contacts' announced in International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), requires that this State's exercise of jurisdiction not offend traditional notions of fair play and substantial justice." (Petition, A-15).

SUMMARY OF ARGUMENT

The Supreme Court of the United States should deny the Petition for Writ of Certiorari because the South Carolina Court of Appeals correctly applied prior decisions of the Supreme Court of the United States, setting forth standards for in personam jurisdiction, to the particular facts of this case. The South Carolina Court of

appeals correctly applied the "minimum contacts" test of International Shoe Co., supra. and its progeny to refuse to allow South Carolina courts to exercise jurisdiction over Respondents. The South Carolina Court of Appeals did not apply a separate test for due process because Respondents provided medical services; but, rather, it considered the facts and the quality and nature of the Respondents' activities in the forum state to determine whether the minimum contacts requirement had been met. Hanson v. Denckla, 357 U.S. 235 (1975); Kulko v. Superior Court, 436 U.S.84 (1978).

The cases cited by Petitioner in support of its argument for certiorari, decisions of the Ninth Circuit Court of Appeals and the Supreme Court of Appeals of West Virginia, are distin-

guishable and therefore are not inconsistent with the holding of this case. The cases relied on by Petitioner involved solicitation in the forum state by the non-resident defendants, and one case, Cubbage v. Merchent, 744 F.2d 665 (9th Cir. 1984), involved their participation in the forum's State Healthcare Program. Wolf v. Richmond County Hospital Authority, 745 F.2d 904 (4th Cir. 1984).

Petitioner's claim does not arise out of Respondent's activities in South Carolina; and it is clear that Respondent's do not provide medical services to Soutn Carolina residents on a systematic basis. (Petition, A-17 to A-18)

That Soutn Carolina might have an interest in providing its residents with redress against treating physicians as evidenced by tne standards

established by its negligence laws has no bearing on the issue of whether the minimum contacts requirement has been met. Further, even if the forum state is the most convenient place for litigation, "the due process clause, acting as an instrument of interstate federalism, may sometimes act to divest the state of its power to render a valid judgment." Worldwide Volkswagen Corp. v. Woodson, 444 U.S.286, 294 (1980).

ARGUMENT

A. Consistency with Prior Decisions of United States Supreme Court

The first point of Petitioner is that "the South Carolina Court of Appeals by its decision in this case holds that due process analysis for medical services is 'quite different' from that 'involving other commercial activity.'" (Petition, p.19). Peti-

tioner argues that no decision has been forthcoming from the United States Supreme Court to suggest that Defendants providing personal services shall be treated differently for jurisdictional purposes than Defendants engaged in other forms of interstate commerce.

Jurisdictional inquiry must be made on the facts of each case. The standards for determining whether the minimum contacts requirement has been met are the same for medical services as for all other forms of interstate activity. The decision of the South Carolina Court of Appeals in this case is consistent with the long line of decisions by the United States Supreme Court setting standards for determining when the "minimum contacts" test has been met.

Respondents are neither actual residents of South Carolina nor deemed to be so by reason of repeated contacts with the state under the International Shoe test. Therefore, "in personam jurisdiction, if it is found to exist at all, must be based upon the McGee rationale. That is, the suit at bar must be related to a transaction which itself has sufficient contact with the forum state, so that it is not unfair to require the Respondents to appear in the forum to defend the manner in which they conducted the transaction." Gelineau v. New York University Hospital, 375 F. Supp. 661, 666 (D.N.J. 1974). Respondents' specific contacts with the state of South Carolina, if any, do not constitute the "minimum contacts" required to confer personal jurisdiction over them by the South

Carolina courts consistently with due process.

McGee v. International Life Insurance Company, 355 U.S. 220 (1957), did not extinguish all restrictions on in personam jurisdiction of state courts.

The Supreme Court has reiterated the need for fundamental fairness when a state subjects a non-resident to the jurisdiction of its courts. As Chief Justice Warren warned in Hanson v. Denckla, supra:

> (B)ut it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts . . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that state that are a prerequisite to its exercise of power over him.

357 U.S. at 251. Assuming, arguendo, that the alleged tort was completed in the forum state, that, in itself, is insufficient. The minimum contacts requirement must be met. Hanson v. Denckla, supra., states:

> The unilateral activity of those who claim some relationship with the non-resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.

357 U.S. at 253 (emphasis added); Du-Al Corp v. Randolph Beaver, Inc., 540 F. 2d 1230 (4th Cir. 1976).

Respondents have not purposefully availed themselves of the privilege of conducting activities within South Carolina. Hanson v. Denckla, supra.

"The Courts . . . must . . . give content to the requirements expressed in Hanson: that the Defendant's contacts with the forum be voluntary in some meaningful sense." Vencedor Mfg. Co. Inc. v. Gougler Industries, 557 F. 2d 886, 891 (1st Cir. 1977). The medical services that Respondents provided to the Petitioner's decedent were performed in North Carolina at the request of Petitioner's decedent who traveled to North Carolina to receive them. The residence of the Petitioner's decedent was, and is now, irrelevant to the services provided by Respondents at their offices.

As pointed out by the United States Supreme Court in Kulko v. Superior Court of California in and for the City of the County of San Francisco, 436 U.S. 84 (1978), not all cases can be

viewed as cases involving a defendant who has commercial activities ongoing in a particular state. Here, the decedent's first contact with the Respondents in this case came following the referral by his local physician; the Respondents requested that the decedent travel to North Carolina for evaluation; the decedent was examined and returned to the care of the referring physician with instructions from the Respondents. The Respondents sent copies of their findings to the local physician for his files and for further reference. This type of activity must be distinguished from the commercial activity discussed in McGee and Parker. As stated in Gelineau v. New York University Hospital:

> Unlike a case involving voluntary interstate or international economic activity . . . the residence of a recipient of personal services

> rendered elsewhere is irrelevant and totally incidental to the benefits provided by the defendant at his own location. It is clear that when a client or a patient travels to receive professional services without having been solicited . . . then the client, who originally traveled to seek services apparently not available at home, ought to expect that he will nave to travel again if he thereafter complains that the services sought by him in the foreign jurisdiction were therein rendered improperly.

375 F. Supp. at 667. This case does not involve a defendant who has introduced a defective product into the stream of commerce. Neither is it one involving an act performed for the purpose of causing an effect in South Carolina. In those cases, personal jurisdiction nas been upheld, and with good reason. In a products case, the manufacturer knows that the product, traveling through interstate commerce, will ultimately reach a consumer in any state of the United States. The manu-

facturer derives revenue from sales in the foreign forum. The manufacturer has performed "some act by which he has purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking tne benefits and protection of its laws." Hanson v. Denckla, 357 U.S. at 253.

The Supreme Court nas recently characterized the test to be applied when a Plaintiff's claim does not arise out of a Defendant's activities in the forum state as whether the contacts are of a "continuous and systematic" nature. Helicopteros Nacionales de Colombia, S.A. v. Hall, __ U.S. __ 104 S.Ct. 1868, 80 L.Ed. 2d 404 (1984); Wolf v. Richmond County Hospital Authority, supra. Because this case does not arise out of Respondents'

activities in the forum state, the South Carolina Court of Appeals went on to correctly hold that:

"We do not glean from the conduct of the Appellants an intent on their part to purposefully avail themselves of the privilege of providing medical services to South Carolina residents on a systematic basis . . . . By providing services to Hume, the Appellants were merely fulfilling their professional responsibilities to provide medical services to a patient in need, and should not by doing so automatically subject themselves to the jurisdiction of the Courts of this state." (Petition, A-17 to A-18).

B. Decision not in conflict with Decisions of Courts from other States of Federal Courts of Appeals

In Wolf v. Richmond County Hospital Authority, 745 F. 2d 904 (4th Cir. 1984), an action similar to the case at bar, the Fourth Circuit Court of Appeals applied the decision of the South Carolina Court of Appeals in this case and reversed the District Court's ruling that South Carolina had jurisdiction over an Augusta, Georgia hospital. After reviewing and approving of the decision of the South Carolina Court of Appeals in this case, the Fourth Circuit Court of Appeals went on to distinguish cases cited by the Plaintiffs, which are the same cases cited by Petitioner herein: Cubbage v. Merchent, 744 F. 2d 665 (9th Cir. 1984), cert. denied, 105 S.Ct. 1359, and S.R. v. City of Fairmont, 280 S.E. 2d 712 (W. Va. 1981). In Wolf, the Fourth Circuit Court of Appeals held:

> The cases relied on by the Wolfs in which doctors or medical facilities were found to be subject to the jurisdiction of a foreign court are distinguishable because, in these cases, the defendant either actively solicited or encouraged the non-resident to travel to their facility for treatment or had patient referral or transfer contacts. Cubbage v. Merchent, supra. (defendant physicians applied for and received Medi-Cal numbers in order to receive reimbursement from forum state for services rendered to eligible residents of forum state; defendant hospital took out a paid advertisement in yellow pages of telephone directory distributed in forum state); . . . S.R. v. City of Fairmont, 280 S.E. 2d 712 (W.Va. 198) (defendant medical corporation found to derive a direct economic benefit from solicitation made by an abortion clinic in defendant's home state for abortion business from forum state).

745 F. 2d at 912. (emphasis added).

Thus, in Cubbage v. Merchent, supra, the non-resident doctors purposefully took some action by which they invoked the benefits and protection of California law when they applied for a Medi-Cal number, which

would entitle them to receive reimbursement from the State of California for services rendered to eligible residents of that forum state. The Plaintiff's claim arose out of or resulted from the non-resident's forum related activities - participation in the state Health Care Program and phone directory (yellow pages) solicitation. Also, in S.R. v. City of Fairmont, supra, the Supreme Court of Appeals of West Virginia was deciding a certified question as to the correctness of the Circuit Court's dismissal of the non-resident medical corporation for lack of personal jurisdiction. The Supreme Court of Appeals held that the Plaintiff should be entitled to pursue additional discovery against said Defendant to develop its involvement and knowledge with the solicitation of

abortions by the resident medical center "and such other facts that may bear on its contacts with this State." 280 S.E. 2d at 718.

In the cases relied on by Petitioner, the claims indeed arose out of purposeful, voluntary, interstate economic activity directed at the forum state in order to benefit from the effects sought there. But here, Respondents solicit no business and do no business in South Carolina. In the case of unsolicited personal services, such as those of the physicians in the instant case, "the nature of the contacts is normally grounded outside of any relationship within the forum state. . . . (T)he residence of a recipient in the forum state is irrelevant and incidental to the benefits provided by the Respondents in their

location." Wright v. Yackley, 459 F. 2d 287, 289-290.

"It is a defendant's contacts with the forum state that are of interest in determining if in personam jurisdiction exists, not its contacts with a resident." Aaron Ferer & Sons Co. v. Atlas Scrap Iron, 558 F. 2d 450, 455, n. 6 (8th Cir. 1977), as cited in Glover v. Wagner, 462 F. Supp. 308, 311 (D. Neb. 1978).

Jurisdictional inquiry must be made on the facts of each case. The standards for determining whether the minimum contacts requirement has been met are the same for medical services as for all other forms of interstate activity. However, "the application of that rule will vary with the quality and nature of the Defendant's activity" and in each case it is essential that

"there be some act by which the Defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." Hanson, 357 U.S. at 253. Indeed, if a medical center or doctor engages in purposeful, voluntary, interstate practice, then jurisdiction has and should be upheld, and for good reason. E.g., Cubbage v. Merchent, supra; Lemke v. St. Margaret's Hospital, 552 F. Supp. 833 (N.D. Ill. 1982). But in this case, Respondents have not purposefully availed themselves of the privilege of conducting activities within South Carolina.

C. Interest of Forum State, Convenience

Petitioner seeks to establish that South Carolina has an interest in pro-

viding its residents with redress against treating physicians as indicated by the standards established by its negligence laws. While the general proposition of providing for redress under its laws for its residents is a valid interest for all states, Respondents wish to point out that "(t)he interest analysis that is often applied to choice of law problems will not always supply answers to this jurisdictional question." Vencedor, supra., 557 F. 2d at 890. The United States Supreme Court has consistently differentiated factors which affect the choice of substantive law applicable to a controversy from those which permit a court to exercise personal jurisdiction over a non-resident. In Hanson v. Denckla, supra., the court expressly

separated choice of law from jurisdictional rules:

> * * * It does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice by law. It is resolved in this case by considering the acts of the Trustee. 357 U.S. at 254 (emphasis added).

See also Shaffer v. Heitner, 433 U.S. 186, 215, 97 S.Ct. 2569, 2586, 53 L.Ed. 2d 683 (1977); Kulko v. Superior Court of California, 436 U.S. 84, 98, 98 S.Ct. 1690, 1700, 56 L.Ed. 2d 132 (1978).

That South Carolina may have an interest in providing a forum for its residents to seek redress against treating physicians, or that it may be more convenient for Petitioner to litigate in South Carolina, is not determinative. Those are only two elements to be considered, and the absence of

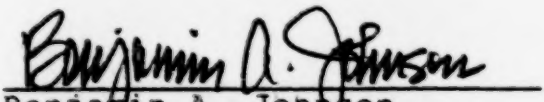
minimum contacts between Respondents and South Carolina precludes the assertion of jurisdiction by the courts of that State. "Even if the defendant would suffer minimal or no inconveniences from being forced to litigate before the tribunals of another state; even if the forum state has a strong interest in applying its law to the controversy; even if the forum state is the most convenient location for litigation, the due process clause, acting as an instrument of interstate federalism, may sometimes act to divest the state of its power to render a valid judgment." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980), citing Hanson v. Denckla, 357 U.S. 235 (1958).

CONCLUSION

The Supreme Court of the United

States should deny the Petition for Writ of Certiorari because the decisions of the Ninth Circuit Court of Appeals and the Supreme Court of Appeals of West Virginia, relied upon by Petitioner, are distinguisnable and are not inconsistent with the holding of this case, and because the decision of the South Carolina Court of Appeals correctly applied prior decisions of the Supreme Court of the United States, setting forth standards for *in personam* jurisdiction, to the particular facts of this case.

RESPECTFULLY SUBMITTED,



Benjamin A. Johnson
Robert R. Carpenter
Roddey, Carpenter & White, P.A.
PO Box 560
Rock Hill, S.C. 29731-6560

(803)324-4500
Attorneys for Respondents.

September 5, 1985